1999

State of Utah v. Kenneth Nelson : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	Case No. 991022
Plaintiff and Appellee,	)	
v.	)	
	)	
KENNETH NELSON,	)	Classification Priority 2
	)	
Defendant and Appellant.	)	

BRIEF OF APPELLANT ACCOMPANYING MOTION FOR LEAVE TO WITHDRAW

Appeal from the Judgment, Sentence and Commitment of the Fifth Judicial District Court in and for Iron County, State of Utah, the Honorable J. Philip Eves presiding.

FLOYD W HOLM
Attorney for Defendant/Appellant
141 North Main, Suite 220
P.O. Box 2855
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Telephone: (435) 865-5800

J. FREDERIC VOROS, JR.
Assistant Attorney General
Attorney for Plaintiff/Appellee
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

IN THE UTAH COURT OF APPEALS

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State of Utah,

Plaintiff and Appellee,

v.

Kenneth Nelson,

Defendant and Appellant.

ORDER

Case No. 991022-CA

This matter is before the Court upon a motion for leave to withdraw as counsel for appellant, filed by Floyd W. Holm on July 31, 2000, and upon appellant's motion filed August 7, 2000 for enlargement of time to July 28, 2000 to file appellant's brief.

The Court has refused to rule on appellant's motion for enlargement of time until appellant's counsel returned the trial court record to this court. On August 31, 2000, the trial record was returned.

IT IS HEREBY ORDERED that the brief submitted on July 28, 2000, is accepted for filing. Appellee's brief, if any, shall be filed within thirty (30) days of the date of this order.

IT IS FURTHER ORDERED that Mr. Holm's motion for leave to withdraw is deferred pending plenary consideration of the case. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 18 L.Ed 2d 493(1967).

Dated this 31 day of August, 2000.

FOR THE COURT:

Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on September 1, 2000, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

FLOYD W. HOLM
ATTORNEY AT LAW
141 N MAIN STE 220
PO BOX 2855
CEDAR CITY UT 84721-2855

J. FREDERIC VOROS, JR.
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

Dated this September 1, 2000.

By _____
Deputy Clerk

Case No. 991022-CA

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL

MARK L. SHURTLEFF
ATTORNEY GENERAL

RAY HINTZE
CHIEF DEPUTY-CIVIL

RYAN MECHAM
CHIEF OF STAFF

KIRK TORGENSEN
CHIEF DEPUTY-CRIMINAL

18 January 2001

Paulette Stagg
Clerk of the Court
Utah Court of Appeals
Scott M. Matheson Courthouse
450 South State Street
Salt Lake City, Utah 84114

Re: ***State v. Nelson***, Case No. 991022-CA

Dear Ms. Stagg:

The purpose of this letter is to clarify that the State's previous letter, dated 15 December 2000, was filed in lieu of a brief in this case. ***See State v. Clayton***, 639 P.2d 168, 170 (Utah 1981) (recognizing that if the defendant's brief is in compliance with requirements of ***Anders v. California***, 386 U.S. 738, and ***Clayton***, the State is not required to submit a responsive brief).

Sincerely,

Marian Decker
MARIAN DECKER
Assistant Attorney General

copy: Floyd W. Holm

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff and Appellee, v. KENNETH NELSON, Defendant and Appellant.	)))))))))	Case No. 991022 Classification Priority 2

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter in that it is an appeal in a criminal case not involving a first degree or capital felony. Utah Code Ann. §78-2a-3(2)(e)(1996).

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

The issues presented for review in this case by Appellant are as follows:

(a) Did the lower court properly find that the witness Robyn Iberg was unavailable in light of the facts and circumstances?

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter in that it is an appeal in a criminal case not involving a first degree or capital felony. Utah Code Ann. §78-2a-3(2)(e)(1996).

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

The issues presented for review in this case by Appellant are as follows:

(a) Did the lower court properly find that the witness Robyn Iberg was unavailable in light of the facts and circumstances?

(b) Did the trial court improperly allow certain hearsay statements of Iberg to be read at trial, over the objection of defendant, even though defendant had not objected to such evidence at the preliminary examination?

As to the first issue, the standard of review is whether the lower court abused its discretion in finding the witness unavailable and determining the efforts of the State in obtaining the witness at trial were "in good faith". State v. Chapman, 655 P.2d 1119, 1122 (Utah 1982).

As to the second issue, the standard of review is one of correctness; that is, whether the trial court properly allowed hearsay evidence to be read at trial that was not objected to at the time of the preliminary examination. State v. Kateso, 684 P.2d 63, 64 (Utah 1984).

TEXT OF AUTHORITIES

1. Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Utah Const. Art. I, § 12.

2. If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall order, in writing, that the defendant be bound over to answer in the district court. The findings of probable cause may be based on hearsay in whole or in part. Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination.

Utah R. Crim. P. 7 (h)(2).

3. Any error, defect, irregularity or variance which does not effect the substantial rights of a party shall be disregarded.

Utah R. Crim. P. 30 (a).

4. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is effected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.

Utah R. Evid. 103 (a)(1).

5. "Unavailability as a witness" includes situations in which the declarant:

. . . .

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

Utah R. Evid. 804 (a)(5).

6. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

Id., Subsection(b)(1).

7. Utah R. Evid. 1102 is set forth *verbatim* in the Addendum.

STATEMENT OF THE CASE

A. Nature of the Case.

This is a criminal case wherein defendant was charged with theft of a motor vehicle, a Second Degree Felony, leaving the scene of an accident, a Class C Misdemeanor and intoxication, a Class C Misdemeanor.

B. Course of the Proceedings.

On June 2, 1999 a preliminary examination was held in which defendant was bound over on all the aforesaid charges. In district court on arraignment, defendant pled not guilty to said charges and the matter proceeded to jury trial on September 21, 1999. On the day prior to trial, the court conducted a hearing as to whether a certain witness, one Robyn Iberg, was unavailable, therefore allowing her preliminary hearing testimony to be read at trial. The court concluded that the witness was unavailable and her testimony was read at trial.

At the conclusion of trial, the jury rendered a verdict of guilty against defendant on all three counts.[1]

C. Disposition of the Trial Court.

Based upon the jury verdict and having obtained a presentence investigation and report, the court entered a Judgment, Sentence and Commitment wherein defendant was sentenced to a

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[1]Although the offense of intoxication was submitted to the jury, during the course of trial defendant admitted that he had committed that offense.

term of imprisonment of one to fifteen years in the Utah State Prison and two 3-month jail sentences, all to be served concurrently.

D. Statement of Facts.

On or about May 23, 1999, defendant was residing with one Robyn Iberg, who was the girlfriend of defendant's half brother, who was then incarcerated in the Iron County Jail. On that same night, an unknown informant reported an accident involving a vehicle owned by Peter Pikyavit. Pikyavit resided in an apartment near where defendant was residing. The vehicle had collided with a gas meter and the unidentified informant reported seeing an individual leave the vehicle and enter the apartment building where defendant resided. Upon being informed of the accident by law enforcement authorities, Pikyavit stated that the vehicle must have been stolen and that he was not driving it at the time of the accident. (Transcript of Trial [hereinafter Tr.] 60, 80, 92-93).

Prior to trial the State filed a certain Notice of Hearsay Declarant Unavailability under Rule 804 of the Utah Rules of Evidence. On September 20, 1999, this notice was set for an evidentiary hearing for determination as to whether the hearsay declarant was, in fact, unavailable. Based upon factual evidence presented by officers who had made numerous

attempts to locate and serve Iberg with a subpoena, the court found that Robyn Iberg was unavailable and allowed her preliminary hearing transcript to be read at trial.[2] (R. 28-32).

Iberg testified at preliminary hearing (and, therefore, at trial) that on the night in question, Iberg had gone with another man to a wedding in Beaver, Utah, some 50 miles away. Upon her return, the defendant was intoxicated and defendant admitted to her that he had stolen a vehicle and "needed some money" to leave town. She reported this information to officers investigating the accident when they arrived at her apartment a second time after the officers had first been led to another apartment based upon incorrect information from the unknown informant. (Tr. 81-84).

In the course of her preliminary hearing testimony Iberg also testified as follows:

> Q: Did the police ever come back?
>
> A: In about 15 minutes they came back and they took Kenny outside and then they asked me what was really going on or they were gonna have me arrested for false statements so me and my little girl went into the building and stated to them that he had told us that he had stolen a car and that he was going to Mesquite.

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[2]Although counsel for defendant requested a transcript of the hearing on September 20, 1999 (See copy of Promise to Pay Cost of Transcript included in Addendum), counsel certifies to the court that he believes that there was sufficient evidence to support the court's finding of unavailability and, therefore, a transcript is unnecessary. Nevertheless, if this court determines that such transcript is necessary to determine counsel's motion to withdraw herein under State v. Clayton, 639 P.2d 168, 169-70 (Utah 1981), then, on behalf of defendant, counsel requests the court to stay further proceedings on this appeal until such transcript is obtained. (Incidentally, it was only upon preparing this brief that counsel for defendant first discovered that there was not a transcript of the September 20, 1999 hearing in the record on appeal.)

. . . .

Q: Okay he was present when he told you that he had stolen a vehicle?

A: Myself. And he also had told his niece, [D. N.], that he had taken a car. But I guess he had told her separately; then he had told me.

(R. 96 at 8, 12) (emphasis added).

Although counsel for defendant did not object to the above evidence at preliminary hearing, he did object to the court allowing such evidence to be read at trial on the grounds that it was hearsay and without foundation. The court overruled defendant's objection, holding that since such evidence was not objected to at the preliminary hearing, it was therefore admissible at trial. (Tr. 74-76, 83, 88).

SUMMARY OF ARGUMENT

POINT I: Although the state was required to make a "good faith" showing that it had made appropriate attempts to locate and subpoena Robyn Iberg as a witness, there was substantial evidence at the hearing on September 20, 1999 to justify the court's decision to determine that Iberg was unavailable.

POINT II: Although it is arguable that the court should have allowed defendant to object to the hearsay testimony from Iberg given at preliminary hearing at the time of trial, the lower court was correct that defendant should have made such objection at the time of preliminary hearing because it was not "reliable hearsay" as defined by the Utah Constitution and the Rules of

Criminal Procedure and Evidence. Moreover, even assuming it was error for the court to overrule defendant's objection to such testimony at trial, such error was probably harmless in that it was unlikely it would change the outcome of the trial.

ARGUMENT

POINT I

APPELLANT CONTENDS THAT THE COURT ABUSED ITS DISCRETION IN DETERMINING THAT THE WITNESS WAS UNAVAILABLE

Under State v. Chapman, 655 P.2d 1119, 1122 (Utah 1982), in order to determine that a witness is unavailable under Rule 804 of the Rules of Evidence, the court must determine that the efforts of the State in obtaining the attendance of the witness at the trial were "in good faith". In this case, there was ample evidence to show that officers had made numerous attempts to locate and to serve Ms. Iberg a subpoena for trial. Based upon the representation of counsel, such evidence was sufficient to show that Iberg was unavailable to testify at trial and, therefore, her preliminary hearing testimony could be read at trial. *See* State v. Brooks, 638 P.2d 537 (Utah 1981).

POINT II

APPELLANT CONTENDS THAT HEARSAY STATEMENTS OF IBERG ADMITTED AT TRIAL SHOULD HAVE BEEN EXCLUDED AS HEARSAY

It should be undisputed that the statements of Ms. Iberg to the effect that defendant admitted to his niece (Iberg's daughter) that he had stolen a vehicle were hearsay as that is defined under Rule 801 of the Utah Rules of Evidence. [3] Utah R. Evid. 801 (c).

Defendant argued at trial that such hearsay should not be admitted even though he did not object through counsel to such testimony at the preliminary hearing. The partial basis for the court to allow and sustain such objection is that "reliable hearsay" is admissible at preliminary hearings but may not be at trial. Utah Const. Art. I § 12; Utah R. Crim. P. 7 (h)(2). Arguably, under Rule 1102 (b)(2) of the Utah Rules of Evidence, defendant's statement against interest to his niece would have been admissible "reliable hearsay" at the preliminary hearing, but not at trial. Unfortunately, defendant, not his niece, was the "declarant" of such statement against anothers's (her uncle's) interest and the niece's statement to her mother would not have been admissible even at preliminary hearing, unless the niece herself were present to testify. Accordingly, the court may have been correct in not excluding the evidence at trial since it was

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[3] Although such statements by defendant to his niece would not be hearsay as admissions under Rule 801 (2) of the Utah Rules of Evidence, since the statements were offered at trial through Iberg, not the niece, they constituted hearsay within hearsay. Utah R. Evid. 805. In other words, although the statements to the niece were not hearsay, the niece's representations to her mother as to what defendant said were hearsay not within an exception.

not objected to at preliminary hearing in that defendant had not properly preserved his objection under Rule 103 of the Utah Rules of Evidence.

At trial, in objecting to such evidence, counsel for defendant argued that the preliminary hearing testimony was analogous to a deposition in a civil case and, therefore, even though the objection was not made at the preliminary hearing, such objection could still be made at trial. *Cf.* Utah R. Civ. P. 32 (b) & (c)(3)(A).

Even assuming that the court committed error in not sustaining defendant's objection as to the hearsay within hearsay statements to defendants niece, it is the opinion of counsel for defendant that such error was harmless within the contemplation of Rule 30 (a) of the Utah Rules of Criminal Procedure. Although defendant's statements to his niece were prejudicial, they were merely cumulative of Iberg's direct testimony that defendant admitted to her that he had stolen the vehicle. In other words, even without the hearsay statements to the niece, there still remained the admission to Iberg, which could easily sustain the jury's verdict of guilt. See State v. Chapman, 655 P.2d 1119, 1124-25 (Utah 1982).

CERTIFICATE OF COUNSEL AND CONCLUSION

Pursuant to State v. Clayton, 639 P.2d 168, 169-70 (Utah 1981), counsel hereby certifies that he has provided Defendant with a copy of the Brief of Appellant Accompanying Motion for Leave to Withdraw, along with notice that he may raise additional issues if he chooses, upon leave of the court. In conclusion, counsel submits the above potential points on appeal and

certifies that, based upon the above discussion, he believes them to be wholly frivolous and without merit and, therefore, requests the court to allow him to withdraw as counsel.

DATED THIS 28th day of July, 2000.

FLOYD W HOLM

CERTIFICATE OF MAILING

I certify that on this 28th day of July, 2000, I mailed a true and correct copy of the foregoing Brief of Appellant Accompanying Motion for Leave to Withdraw to the following:

J. Frederic Voros, Jr.
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

Inmate: Kenneth Nelson #29454
Central Utah Correctional Facility
P.O. Box 550
Gunnison, UT 84634

FLOYD W HOLM

ADDENDUM

SCOTT M. BURNS (#4283)
Iron County Attorney
97 North Main, Suite #1
P.O. Box 428
Cedar City, Utah 84720
Telephone: (435) 586-6694

FILED
NOV 1
5th District Court
IRON COUNTY

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH,	)	**JUDGMENT, SENTENCE, AND COMMITMENT**
Plaintiff,	)	
vs.	)	
KENNETH NELSON,	)	Criminal No. 991500527
Defendant.	)	Judge J. Philip Eves

The Defendant, KENNETH NELSON, having been convicted, pursuant to a jury trial, of THEFT OF AN OPERABLE MOTOR VEHICLE, a Second-Degree Felony; LEAVING THE SCENE OF AN ACCIDENT, a Class C Misdemeanor; and INTOXICATION, a Class C Misdemeanor; said jury trial held on September 21, 1999, in Parowan, Utah, and the Court having entered said verdicts of guilty and thereafter having ordered the preparation of a presentence investigation report, and after said report was prepared and presented to the Court, the Court having called the above-entitled matter on for sentencing on November 1, 1999, in Parowan, Utah, and the above-named Defendant, KENNETH NELSON, having appeared before the Court in person together with his attorney of record Floyd W Holm, and the State of Utah having appeared by and through Iron County Attorney Scott M. Burns, and the Court having reviewed the presentence investigation

report and having further reviewed the file in detail, and the Court having heard statements from the Defendant, his attorney, and the Iron County Attorney, and the Court having reviewed the file in detail and being fully advised in the premises now makes and enters the following Judgment Sentence, and Commitment, to wit:

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant KENNETH NELSON, has been convicted of the offenses of THEFT OF AN OPERABLE MOTOR VEHICLE, a Second-Degree Felony; LEAVING THE SCENE OF AN ACCIDENT, a Class C Misdemeanor; and INTOXICATION, a Class C Misdemeanor; and the Court having asked whether the Defendant had anything to say in regard to why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is adjudged that the Defendant is guilty as charged and convicted

SENTENCE

IT IS HEREBY ORDERED that the Defendant, KENNETH NELSON, and pursuant to the conviction of THEFT OF AN OPERABLE MOTOR VEHICLE, a Second-Degree Felony, hereby sentenced to a term of imprisonment in the Utah State Prison for a period of one (1) to fifteen (15) years, and the Defendant is hereby placed in the custody of the Utah State Department of Corrections

IT IS FURTHER ORDERED that the Defendant, KENNETH NELSON, and pursuant to the conviction of LEAVING THE SCENE OF AN ACCIDENT, a Class C Misdemeanor, hereby sentenced to a term of incarceration in the Iron County Jail for a period of three (3) months, and the Defendant is hereby placed in the custody of the Iron County Sheriff

IT IS FURTHER ORDERED that the Defendant, KENNETH NELSON, and pursuant to his conviction of INTOXICATION, a Class C Misdemeanor, is hereby sentenced to a term of incarceration in the Iron County Jail for a period of three (3) months, and the Defendant is hereby placed in the custody of the Iron County Sheriff.

IT IS FURTHER ORDERED that no fines shall be imposed.

IT IS FURTHER ORDERED that the terms or imprisonment set forth above (1-15 years in the Utah State Prison, 3 months in the Iron County Jail, and 3 months in the Iron County Jail) shall be served concurrently.

FINALLY, IT IS FURTHER ORDERED that, as a term and condition of any parole the Defendant may receive, he shall pay restitution to the victims in the amount of six hundred ninety dollars and sixty-two cents ($690.62), said payments to be made through Adult Probation and Parole

COMMITMENT

TO THE SHERIFF OF IRON COUNTY, STATE OF UTAH:

YOU ARE HEREBY COMMANDED to take the Defendant, KENNETH NELSON, and deliver him to the Utah State Prison in Draper, Utah, there to be kept and confined in accordance with the above and foregoing Judgment, Sentence, and Commitment

DATED this 15th day of November, 1999.

BY THE COURT:

J. Philip Eves

J. PHILIP EVES
District Court Judge

CERTIFICATE

STATE OF UTAH)
:ss.
COUNTY OF IRON)

I, CAROLYN BULLOCH, Clerk of the Fifth Judicial District Court in and for Iron County, State of Utah, hereby certify that the foregoing is a full, true, and exact copy of the original Judgment, Sentence, and Commitment in the case entitled State of Utah vs. Kenneth Nelson, Criminal No. 991500527, now on file and of record in my office.

WITNESS my hand and the seal of said office in Cedar City, County of Iron, State of Utah, this 16 day of November, 1999.

CAROLYN BULLOCH

CAROLYN BULLOCH
District Court Clerk

By: _____
Deputy District Court Clerk

(S E A L)

FEB -3 A 11:29

PROMISE TO PAY COST OF TRANSCRIPT

Case Name: State V Nelson

Trial Court Case No: 991500527

Appellate Court Case No.: 991022

Estimated Cost of Transcript: $1,047.50

A request for a transcript of the proceedings held in the above referenced case on September 21, 1999 and Sept 20, 1999 has been made by the undersigned. It is hereby acknowledged that

X IRON COUNTY

____ Cedar City

____ State of Utah

____ Court Appointed Public Defenders Office

is obligated to pay the cost of preparing such transcript pursuant to Utah Law, and that such payment will be made upon completion of the transcript.

DATED: 1st day of February, ~~1999.~~ 2000

BY: [signature]

Iron County Attorney

[signature]

Public Defender

Rule 1102. Reliable hearsay in criminal preliminary examinations.

(a) *Statement of the rule.* Reliable hearsay is admissible at criminal preliminary examinations.

(b) *Definition of reliable hearsay.* For purposes of criminal preliminary examinations only, reliable hearsay includes:

(1) hearsay evidence admissible at trial under the Utah Rules of Evidence;

(2) hearsay evidence admissible at trial under Rule 804 of the Utah Rules of Evidence, regardless of the availability of the declarant at the preliminary examination;

(3) evidence establishing the foundation for or the authenticity of any exhibit;

(4) scientific, laboratory, or forensic reports and records;

(5) medical and autopsy reports and records;

(6) a statement of a non-testifying peace officer to a testifying peace officer;

(7) a statement made by a child victim of physical abuse or a sexual offense which is promptly reported by the child victim and recorded in accordance with Rule 15.5 of the Utah Rules of Criminal Procedure;

(8) a statement of a declarant that is written, recorded, or transcribed verbatim which is:

(A) under oath or affirmation; or

(B) pursuant to a notification to the declarant that a false statement made therein is punishable;

(9) other hearsay evidence with similar indicia of reliability, regardless of admissibility at trial under Rules 803 and 804 of the Utah Rules of Evidence.

(c) *Continuance for production of additional evidence.* If hearsay evidence is proffered or admitted in the preliminary examination, a continuance of the hearing may be granted for the purpose of furnishing additional evidence if:

(1) The magistrate finds that the hearsay evidence proffered or admitted is not sufficient and additional evidence is necessary for a bindover; or

(2) The defense establishes that it would be so substantially and unfairly disadvantaged by the use of the hearsay evidence as to outweigh the interests of the declarant and the efficient administration of justice.

(Added effective April 1, 1999.)